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No. 80-1274

In the Supreme Court of the United States

OCTOBER TERM, 1980

ANDREW C. CONNOR, PETITIONER

v.

UNITED STATES OF AMERICA AND
THE DEPARTMENT OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner seeks review of the dismissal of two consolidated cases alleging violations of his rights under the Privacy Act of 1974, 5 U.S.C. 552a. In essence, he contends that the Army maintained an informal file on him from which false information was disseminated without his prior written consent and without allowing him to correct the information.

1. Petitioner was a civilian employee at the United States Army Armored Center, Fort Knox, Kentucky, from March 13, 1974, to August 11, 1976, at which time he was separated for inefficiency (Pet. App. 2a). While employed at Fort Knox, he was sent on temporary duty to Fort Benning, Georgia, from January 10, 1975, to June 30, 1975 (*id.* at 3a). Upon petitioner's return, his supervisor at Fort Knox, Col. Clark Burnett, requested an evaluation of petitioner's performance while at Fort Benning in order to prepare an official

evaluation. Col. Burnett received the requested information in the form of letters containing unfavorable statements concerning petitioner (*id.* at 3a; Pet. 8). Copies of these letters were furnished to petitioner on July 31, 1975 (Pet. App. 3a). Although copies of these letters were forwarded to the Civilian Personnel Office (CPO), they were not placed in petitioner's official personnel file but instead were returned to his supervisor. Col. Burnett kept copies of the letters in a unmarked folder in his office safe, but they were not indexed to any identifier assigned to petitioner (*ibid.*).

In November 1975, Col. Burnett provided a personal evaluation of petitioner to supervisory personnel at Fort Rucker and Fort Leavenworth, where petitioner was exploring job opportunities. The discussion included Col. Burnett's recollection of the contents of the Fort Benning letters (Pet. App. 4a). On December 8, 1975, Col. Burnett formally recommended to the CPO that petitioner's employment be terminated. Petitioner was given his official 90-day notice on February 7, 1976, and was subsequently granted access to his records, including the Fort Benning evaluations (*ibid.*). Petitioner was terminated for inefficiency on August 11, 1976, and the Fort Benning evaluation letters became part of his adverse action file (C.A. App. 98).[1] When he appealed his termination, these letters became part of his appeals file (*ibid.*). At no time did petitioner make any effort to correct or amend these letters (Pet. App. 4a).

2. This petition involves two consolidated actions, filed in the United States District Court for the Western District of Kentucky, alleging violations of the Privacy Act and seeking $6 million in damages (Pet. App. 2a). The first action was dismissed for failure to exhaust administrative remedies. Petitioner appealed and, while the appeal was

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[1]"C.A. App." refers to the appendix filed in the court of appeals.

pending, filed a second suit alleging that he had exhausted his administrative remedies. The first case was then remanded by the court of appeals to the district court, where it was consolidated with the second complaint (*ibid.*).

The district court granted the government's motion for summary judgment, holding that petitioner had not exhausted his administrative remedies and that any disclosure of the Fort Benning letters had been properly made to persons who had a need for the records (Pet. App. 4a-7a). The court of appeals affirmed "for the reasons set forth in the [district court's] memorandum opinion" (*id.* at 8a).

3. Petitioner's Privacy Act claims relate essentially to two categories of alleged agency misconduct: that the Army maintained inaccurate records on him (Pet. 14-24) and that information about his job performance in those records was improperly disclosed (Pet. 24-26). The district court correctly entered summary judgment against petitioner with regard to both claims. Its decision, summarily affirmed by the court of appeals, does not conflict with the decision of any other court. Accordingly, this case does not warrant further review.

a. As the district court correctly held (Pet. App. 5a-6a), petitioner's claim with respect to alleged maintenance of inaccurate records is barred by his failure to exhaust his administrative remedies. See *McKart* v. *United States*, 395 U.S. 185, 193-195 (1969).[2] Subsections (d)(2)-(d)(4) of the

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[2]Petitioner's contention (Pet. 20) that the legislative history of the Privacy Act reveals that Congress did not intend that complainants be required to exhaust administrative remedies is predicated on a report that concerns a bill totally different from the one ultimately enacted as the Privacy Act. The report's statements concerning direct court suits refer to grievances respecting such matters as compelled psychological testing of employees and agency questionnaires demanding personal information; it was proposed that a special Board of Employee Rights be established to hear such grievances but that an alternative judicial remedy be available without prior resort to the Board. S. Rep. No.

Act, 5 U.S.C. 552a(d)(2)-(d)(4), set forth detailed procedures for seeking amendment of an allegedly inaccurate record. If petitioner had followed the proper procedures, the agency might have agreed to make the specific amendments requested; and if it had refused to amend in response to specific requests, the district court would have had some basis for determining whether the agency had willfully failed to maintain accurate records which served as the basis for an adverse determination against petitioner. See 5 U.S.C. 552a(g)(1)(C), (g)(4). Instead, as the district court observed (Pet. App. 5a), petitioner "has at no time endeavored to comply with the provisions of the statute which, in its elaborate and detailed manner, more than adequately protects the rights of government personnel in the matter of having their records accurately kept."

Petitioner has suggested no adequate reason for not applying the exhaustion doctrine to his case. He knows which records he wished to correct because they were shown to him (Pet. App. 5a; Pet. 8, 9). Unlike the plaintiff in *Harper* v. *Kobelinski*, 589 F. 2d 721 (D.C. Cir. 1978), upon which he relies (Pet. 16, 18), petitioner was specifically informed of agency regulations promulgated in accordance with the record-amendment provisions of the Act (Pet. 18).[3] Petitioner's contention that it would be futile to follow those

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93-724, 93d Cong., 2d Sess. 1-3, 35, 45 (1974). This obviously has no bearing on the question whether an employee must request correction of records according to the established administrative procedures of the Privacy Act before seeking judicial relief under that statute on a claim that the records are inaccurate.

[3]The Act requires agencies to afford procedures consisting of written submissions and responses but does not require evidentiary hearings. 5 U.S.C. 552a(d)(2)-(d)(4). Thus, when a Fort Knox legal officer informed petitioner that no "administrative hearing" was available with respect to his complaint regarding inaccurate records (see Pet. 18-19), he was correctly describing Privacy Act procedures, not informing petitioner that the agency would refuse to accord him the Act's administrative remedies. Petitioner's reference to a hearing examiner's decision

procedures because the administrative mechanism is controlled by the offending agency proves too much, since this would permit any person with a Privacy Act grievance against his employers to avoid pursuing his administrative remedies. Finally, petitioner's contention (Pet. 21-24) that it is now too late for amendment of his records to be of value to him in avoiding his termination is not grounds for making this case an exception to the exhaustion doctrine. As noted above, petitioner's failure to seek specific amendments of his allegedly inaccurate records has left the district court with no adequate basis for determining whether the agency committed a willful violation of 5 U.S.C. 552a(g)(1)(C). See 5 U.S.C. 552a(g)(4).

b. Although the Privacy Act generally bars disclosure of any covered records unless the individual to whom the record pertains gives his prior written consent (5 U.S.C. 552a(b)), this requirement is subject to a number of exceptions. The district court (Pet. App. 7a) correctly relied on one of those exceptions when it rejected petitioner's contention (Pet. 24-26) that his Fort Knox supervisor violated the Act by disclosing the derogatory information about his job performance in the Fort Benning letters to officers at other Army posts who were considering hiring him. Assuming the letters were "records" for the purposes of the Privacy Act, the officers at the other posts were "officers * * * of the agency [the Army] which maintains the record who have a need for the record in the performance of their duties" and thus persons to whom the information could be disclosed without petitioner's prior written consent. 5 U.S.C.

(Pet. 14) is to the grievance proceeding respecting his 90-day notice of termination (C.A. App. 155-214). We note that in that proceeding and in a grievance proceeding respecting his termination, petitioner was free to challenge the propriety of the Army's reliance on his records in connection with the termination decision. Cf. *White* v. *United States Civil Service Comm'n*, 589 F. 2d 713 (D.C. Cir. 1978), cert. denied, 444 U.S. 830 (1979).

552a(b)(1). See *Beller* v. *Middendorf*, 632 F. 2d 788, 798 n.6 (9th Cir. 1980), petition for cert. pending, No. 80-1390 (filed Feb. 17, 1981). Finally, petitioner was aware of the contents of the letters in question and therefore is not a victim of secret "blacklisting," as he contends (Pet. 25, 26).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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